soever, is required in the interests of justice, or for the purpose of any public or other inquiry, or in the national interest, or in the interests of the person detained, in custody or confined, the Minister may order that such person be taken to that place.

(2) Any person in course of being taken to any place inpursuance of the provisions of sub-section (1) and whilst at such place shall be kept in such custody as the Minister may direct and whilst in that custody shall be deemed to be in lawful custody.

Since the wordings in s. 13 of the 1969 ordinance are couched in clear and unequivocal terms, legal effect must be given to it. The operative part of s. 13(2) of the 1969 Ordinance lies in the following words: "... as the Minister may direct ...". Now, it is worthy to note that in the order of the Deputy Superintendent of the Rehabilitation Centre at Pulau Jerejak, Penang dated 5 April 1993 referred to earlier, nowhere did it state that in the course of taking both the applicants from the Rehabilitation Centre at Pulau Jerejak, Penang to Lokap D9, Ibu Pejabat Polis Kontinjen, Kuala Lumpur, the applicants were to be detained at Ipoh police station. Devoid of such evidence, the detention of both applicants at Ipoh police station are clearly unlawful. In short, the detention of both the applicants at Ipoh police station, done not according to law must surely be illegal (see *Oo Hua Lai v. Menteri HaI Ehwal Dalam Negeri Malaysia & Anor.* [1990] 2 CLJ 368, which was referred to and approved by the Supreme Court in *Lim Thean Lee v. Inspector General of Police & Ors* [1991] 3 MLJ 471 SC). I might as well add, that in an application for a writ of *habeas corpus* the detaining authority has the burden of proving that the detention of the subject is lawful (*Karpal Singh v. Inspector General of Police & Ors* [1989] 1 MLJ 189 SC). Such burden of proof remains throughout with the detaining authority. The subject, on the other hand, is entitled under the law to avail himself of any technical defect which may invalidate the order which deprives him of his personal liberty guaranteed under article 5(1) of the Federal Constitution (*Public Prosecutor v. Koh Yoke Koon* [1988] 2 MLJ 301).

The second ground succeeds and consequently the applications for *habeas corpus* are granted and the applicants are hereby ordered to be set free forthwith.

MUI FINANCE BERHAD

v.

MENTERI KEWANGAN, MALAYSIA

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[ORIGINATING MOTION NO. 25-3-1992]
18 DECEMBER 1993

ADMINISTRATIVE LAW: Exercise of discretionary power by Minister - Appeal for release of motor vehicle seized by Customs - Section 129, Customs Act 1967 - No reason given by Minister for rejection of appeal - Rejection based on policy to reject all applications made by financial institutions - Whether discretion not properly exercised - Whether basis of rejection discriminatory.

CERTIORARI: Exercise of discretionary power by Minister - Reason for making order not stated - Whether Court had power in such circumstance to grant prerogative order.

PRACTICE & PROCEDURE: Application to extend time to file notice of motion - Whether O. 53 r. 3 Rules of the High Court 1980 complied with - Whether O. 53 r. 3 applies to application for leave that was heard inter-partes.

This was an appeal by the respondent against the order of Court granting leave for the issue of *certiorari* to the applicant to quash the decision of the respondent. The facts were that sometime in 1991 a motor lorry belonging to the applicant was seized by the Customs and subsequently ordered to be forfeited by the learned Magistrate. On 12 September 1991 the applicant appealed to the respondent under s. 129 of the Customs Act 1967 for the return of the lorry. The appeal was rejected but no reason whatsoever was given by the respondent for the rejection apart from stating " bahawa adalah menjadi dasar Perbendaharaan untuk menolak permohonan daripada syarikat kewangan". Leave was granted by the Court for the issue of *certiorari* to quash the decision of the respondent and hence the present appeal. The primary issue that arose was whether in rejecting the appeal the respondent had failed to exercise his discretion correctly under s. 129 of the Act and if so, whether, on that ground, the Court could issue an order of *certiorari* to quash the said order of the respondent.

Held:

[1] The policy adopted by the respondent rejecting all appeals coming from financial institutions under s. 129 of the Act rendered the discretionary power given to the respondent under the said Act nugatory. The adoption of such policy further meant that the respondent had not considered the relevant factors before rejecting the applicant's appeal. As such the contention that the respondent had exercised his discretion properly after considering the grounds of the applicant and that he had acted *bona fide* and without any discrimination could not be sustained.

[2] The fact that a Minister gave no reasons for his decision would not prevent the Court from issuing a prerogative order in a proper case. In this case the conclusion was irresistable that the respondent had acted mechanically without applying his mind to the facts and circumstances of the appeal. This was therefore a proper case for *certiorari* to issue.

[3] The object of O. 53 r. 3 of the Rules of the High Court 1980 would be applicable in situations where the application for leave is heard *ex-parte*. In this case the application for leave was ordered by the Court to be heard *inter-partes* and therefore the respondent could not have suffered from any prejudice. The respondent's Counsel was present when the application for leave was heard and he must be deemed to have had notice of the intended substantive application for *certiorari* and the grounds stated therefor. This being the position, the ancillary issue raised by the respondent that the applicant had failed to comply with O. 53 r. 3 of the RHC in that the applicant's "afidavit permohonan tidak diserahkan bersama dengan notis usul pemula" must necessarily fail.

[Order for certiorari confirmed].

Cases referred to:

Padfield & Ors. v. Minister of Agriculture, Fisheries and Food & Ors. [1968] 1 All ER 695 ***(foll)***

Malaysia v. National Union of Journalists, Malaysia & Another Appeal [1991] 1 MLJ 27 ***(foll)***

Rohana bte Ariffin & Hashim Hussain Yaacob v. Universiti Sains Malaysia [1988] 1 CLJ 559 ***(refd)***

Legislation referred to:

Customs Act 1967, s. 129(a), (b)

Rules of the High Court 1980, O. 3 r. 5(1), O. 53 rr. 1(2), 3

Other sources referred to:

Administrative Law of Malaysia and Singapore, Jain, 2nd Edn., p. 382

For the applicant - T. Balaskanda; M/s. Zaman & Associates

For the respondent - Hazman, Federal Counsel

JUDGMENT

Haidar bin Mohd Noor J:

The applicant by way of notice of motion dated 21 January 1992 (encl 3) and supported by the affidavit of Ng Chong Kwee, its branch manager (encl. 2) prayed for:

(1) An order to extend or abridge the time to file this notice of motion from the expiry of six weeks from 9 November 1991 to the date of filing of this notice of motion pursuant to O. 3 r. 5(1) of the Rules of the High Court 1980 ("RHC").

(2) Leave to be granted to the applicant to apply for an order of *certiorari* for the purpose of quashing the order made by the Minister of Finance Malaysia dated 9 November 1991 (the respondent) where the applicant's appeal to the respondent under s. 129 of the Customs Act 1967 ("the Act") for the return of the applicant's motor vehicle bearing registration No. JCF 6150 was rejected by the respondent.

Statement pursuant to O. 53 r. 1(2) of RHC was filed by the applicant (encl. 4). The grounds relied on by the applicant are concisely stated as follows:

(a) The respondent erred in law and there are errors in law as the decision is such that no authority properly directing itself on the relevant law and acting reasonably would have reached it.

(b) The respondnet erred in law and there are errors in law on the face of the record in that the respondent misdirected himself in exercising his discretion under s. 129 of the Act in rejecting the applicant's appeal.

(c) The respondent had acted contrary to the rules of natural justice in rejecting the applicant's appeal under s. 129 of the Act.

(d) The respondent erred in law and there are errors in law on the face of the record in that the respondent had failed to exercise his discretion judicially and had unreasonably deprived the applicant of its property.

On 16 January 1993, an order was made in respect of prayer (1) above. On 26 February 1993, an order for leave was made as in prayer (2) above. Both orders were made after hearing Counsels of both parties.

On 3 November 1993, the application of the applicant (encl. 9) for an order of *certiorari* to quash the decision by the respondent made on 9 November 1991 rejecting the applicant's appeal was granted by the Court with costs. The respondent appealed against this order.

The facts:

On or about 6 April 1991 the applicant's branch office at Batu Pahat entered into a Hire Purchase Agreement with one Lau Eng Kien to finance the hire purchase of motor lorry No. JCF 6150 (exhibit "NCK-1").

On or about 18 July 1991, the applicant was informed by the Customs and Excise Department, Batu Pahat that the said motor lorry was seized for a customs offence. The said motor lorry was ordered to be forfeited by the Magistrates' Court, Batu Pahat on 24 August 1991.

On 12 September 1991, the applicant through its then solicitors, M/s. Abdul Rahman & Associates, made an appeal to the respondent under s. 129 of the Act for the return of the said motor lorry (exhibit "NCK-2"). On 9 November 1991, the respondent rejected the appeal (exhibit "NCK-3"). It is not disputed that from NCK-3 it is clear that no reasons were given by the respondent in rejecting the appeal.

As indicated by the learned Counsel for the applicant, ground (d) is the most relevant and specific ground in considering the application of the applicant. In the circumstances, I addressed my mind principally on this ground.

Section 129 of the Act reads:

> 129. The Minister may, upon application made to him in writing through the Director General, order:
>
> (a) any goods seized under this Act; or
>
> (b) any amount secured under paragraph (a) or (b) of subsection (1) of s. 115 or the amount realized by sale under paragraph (c) of the said subsection (1);
>
> whether forfeited, or taken and deemed to be forfeited pursuant to s. 127 or 128, to be delivered or refunded, as the case may be, to the owner or other person entitled thereto upon such terms and conditions as he may deem fit:
>
> Provided that such application shall be made before the expiration of one calendar month from the date on which such goods or amount are forfeited or are taken and deemed to be forfeited, as the case may be.

The principal issue is whether the respondent had exercised his discretion correctly under s. 129 of the Act in rejecting the appeal of the applicant for the return of the said motor lorry (see "NCK-2"). It is clear that by NCK-2 no reasons were given by the respondent.

The applicant alleged that the respondent rejected its apppeal based on the policy adopted by the respondent to reject all appeals by financial institutions under s. 129 of the Act. If it is true, then the claim of the respondent that all the necessary and relevant factors were considered before rejecting the applicant's appeal could not be true and in the circumstances the discretionary power could not be said to be properly exercised. The respondent through the affidavit of Abdul Hamid bin Taib, a senior officer of the Ministry of Finance (encl. 6) tried to explain on the issue of the policy alleged by the applicant by saying "semasa menulis surat 'NK-4' saya menganggap ini adalah satu polisi dan objek di bawah Akta Kastam 1967". However, it is clearly stated in 'NCK-4' addressed to the present solicitors for the applicant "bahawa adalah menjadi dasar Perbendaharaan untuk menolak permohonan daripada syarikat kewangan". With respect, I could not accept the explanation especially coming from a senior official of the Government as NCK-4 is an official communication and was therefore binding on the respondent. I agree that NCK-4 is in respect of another appeal, but the point that is relevant here is that the tone of NCK-4 applies generally to all appeals coming from financial institutions! In other words, there would be an automatic rejection of all appeals coming from financial institutions under s. 129 of the Act. In that event, the discretionary power given to the respondent by s. 129 of the Act would be nugatory. In all the subsequent affidavits filed by the respondent in respect of this application, it was never at all deposed that this policy ('dasar') had been revoked. What the respondent tried to do was to exhibit 'AGO-1' and 'AGO-2' to say "permohonan (rayuan) institusi kewangan pernah diluluskan" (see paragraph 11 of encl. 11). A scrutiny of the

contents of 'AGO-1' and 'AGO-2' would clearly show that AGO-1 and AGO-2 were in respect of appeals made by insurance companies and not by financial institutions! This fact was never denied by the respondent. AGO-1 and AGO-2 were against the respondent's own contention that they relate to financial institutions. In my view, the contention of the respondent that he had exercised his discretion properly after considering the grounds of the applicant and that he had acted *bona fide* and without any discrimination in respect of the applicant or the financial institutions generally fell to pieces. The other grounds relied on by the respondent, to my mind, were irrelevant and I need not consider them in view of my finding on the issue of policy adopted by the respondent and which remained unretracted. Even if some of the grounds are relevant, it is still open to the respondent to ask for more particulars before exercising his discretion, and if thought fit, to release the said motor lorry, as the respondent is entitled under s. 129 of the Act to impose "such terms and conditions as he may deem fit".

In view of my finding, the next question for me to consider was whether the Court had the power to make an order of *certiorari* to quash the order made by the respondent. In *Padfield & Ors. v. Minister of Agriculture, Fisheries and Food & Ors.* [1968] 1 All ER at p. 695 under para (ii), it is clearly stated:

> The fact that a Minister gave no reasons for his decision, whether or not to exercise a discretionary power conferred on him by statute, would not prevent the Court from reaching a conclusion in a proper case that a prerogative order should issue.

Padfield's case was quoted with approval by our Supreme Court in *Minister of Labour, Malaysia v. National Union of Journalists, Malaysia & Another Appeal* [1991] MLJ at p. 27. In Jain's **Administrative Law of Malaysia and Singapore**, 2nd Edn. at p. 382, the learned author under the heading 'Acting Mechanically' said:

> An authority vested with discretion has to apply its mind to the facts and circumstances of the case before taking an action. If it acts mechanically without applying its mind, its act will be *ultra vires*. This principle is illustrated by *Emperor v. Sibnath Banerjee* (AIR 1945 PC 156).

From the facts deposed and the documents exhibited in the various affidavits, there was no doubt at all that the Court could only draw one irresistable conclusion, that is, the respondent acted mechanically in the exercise of the discretionary power conferred on him by s. 129 of the Act when he rejected the applicant's appeal.

By way of an ancillary issue, the respondent through the affidavit of the Deputy Minister of Finance, Haji Abdul Ghani bin Othman, at para 9 (encl. 11), raised a procedural defect in that the applicant failed to comply with O. 53 r. 3 of the RHC, that is, "Affidavit menyokong permohonan tidak diserahkan bersama dengan notis Usul Pemula". It is to be noted that nowhere in his oral submission did the learned Federal Counsel, acting for the respondent, pressed this issue. Be that as it may, the object of O. 53 r. 3 would seem to be applicable in a situation where the application for leave is heard *ex-parte*. In this case the application for leave was ordered by me to be heard *inter-partes* and therefore, the respondent could not have suffered any prejudice nor indeed could it even have been alleged as the respondent's Counsel was in fact present when the appplication for leave was heard by me and he must, therefore, be assumed to have had notice of the intended substantive application for *certiorari* and of the grounds therefor (*Rohana bte Ariffin v. Universiti Sains Malaysia: Hashim Hussain Yaacob v. Universiti Sains Malaysia,* [1988] 1 CLJ 559).

In the circumstances, this was a proper case for the Court to issue an order of *certiorari* and the application was accordingly granted with costs.